UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PAUL ALBERT GUARDADO, Petitioner, v. GEORGE A. NEOTTI, Respondent.	Case No. 09cv02913 W(RBB) **REPORT AND RECOMMENDATION DENYING PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner Paul Albert Guardado, a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus on December 28, 2009, pursuant to 28 U.S.C. § 2254 [ECF No. 1].[1] Guardado contends that relief is warranted because the California Board of Parole Hearings found him unsuitable for parole at a parole consideration hearing on September 25, 2008, in violation of his constitutional rights. (Pet. 1, 7, 9, 11, ECF No. 1.) Guardado asserts that his due process rights under the Fourteenth Amendment were violated because the Parole Board (1) relied on Petitioner's commitment offense as a basis for denying parole, (2) denied parole without

[1] Because Guardado's Petition and Traverse are not consecutively paginated, the Court will cite to them using the page numbers assigned by the Court's electronic case filing system.

supporting its reasons with "some evidence," (3) failed to establish a rational nexus between the factors it considered and its determination of Guardado's current dangerousness, and (4) based its decision on an offense the Petitioner committed as a minor. (Id.)

On February 23, 2010, M. Hoshino, a prior respondent, filed a Motion to Dismiss the Petition for Writ of Habeas Corpus; Supporting Memorandum of Points and Authorities [ECF No. 4]. The Motion was accompanied by a Notice of Lodgment [ECF No. 4].[2] Petitioner filed an Opposition to Motion to Dismiss the Petition for Writ of Habeas Corpus, Supporting Memorandum of Points and Authorities, Petitioner's Alternative Request for Stay, and supporting exhibits on March 18, 2010 [ECF No. 5]. On April 26, 2010, the Court issued its Report and Recommendation, recommending Respondent's Motion to Dismiss Petition for Habeas Corpus be denied and Petitioner's Alternative Request for Stay be denied [ECF No. 8], which was adopted by the district judge on September 15, 2010. (Order Adopting Report & Recommendation 2, ECF No. 12.)

On December 6, 2010, Respondent filed an Answer to the Petition for Writ of Habeas Corpus and a Supplemental Notice of Lodgment asserting that Guardado is not entitled to relief. (Answer 2-3, ECF No. 15.) As an initial matter, Neotti argues that the Petition is moot because the United States District Court for the Northern District of California granted a previous habeas

[2] The Petition for Writ of Habeas Corpus named M. Hoshino, M. Cate, B. Curry, G. Neotti, and Edmund C. Brown Jr. as Respondents. (Pet. 1, ECF No. 1.) On September 15, 2010, the Court sua sponte dismissed M. Hoshino, M. Cate, B. Curry, and Edmund F. Brown, Jr. (Order 9, ECF No. 12.) The Court therefore only addresses the remaining Respondent, George A. Neotti. (See id.)

petition from Guardado and ordered the Parole Board to set a release date for him. (Id. at 2.)

Respondent Hoshino previously made the same mootness argument. (See Mot. Dismiss 4-6, ECF No. 4.) This Court rejected the argument, and Judge Whelan agreed. (See Report & Recommendation Den. Resp't's Mot. Dismiss 7-16, ECF No. 8; Order Adopting Report & Recommendation 5, ECF No. 12 ("Petitioner's Claim is not Moot Because he is incarcerated.")). At this time, Guardado remains in custody. See Cal. Dep't of Corr. & Rehabilitation Inmate Locator, http://inmatelocator.cdcr.ca.gov/search.aspx (last visited Oct. 24, 2011).

Next, Respondent maintains that Guardado does not have a federal liberty interest in parole, but even if he did, an opportunity to be heard and a statement of reasons for the Board's decision satisfies due process. (Answer 2, ECF No. 15.)

Additionally, Respondent contends that the state courts did not contradict or unreasonably apply Supreme Court holdings in the parole context. (Id. at 4-5.) Neotti argues that the state court decisions were not objectively unreasonable because the superior court found that all of the factors taken together provided a modicum of evidence to support the Parole Board's conclusion. (Id. at 5-8.) Also, he asserts that because the state court was not required to determine disputed issues of fact, this Court cannot find that the state court's decision was based on an unreasonable determination of the facts in light of the evidence. (Id. at 8-9 (citing 28 U.S.C. § 2254(d)(2)).) Finally, Neotti maintains that, as a remedy, Guardado is only entitled to an order remanding the

matter to the Board to proceed in accordance with due process. (Id. at 9.)

The Petitioner filed a Traverse to the Petition for Writ of Habeas Corpus, with exhibits, on December 28, 2010 [ECF No. 18]. On June 30, 2011, Guardado requested leave to file a supplemental brief, which the Court granted [ECF Nos. 23, 24]. Petitioner's Supplemental Brief Re: Swarthout v. Cooke was filed nunc pro tunc to August 2, 2011 [ECF No. 27]. Although the Court also permitted Respondent to file a response to Guardado's Supplemental Brief, to date, Neotti has not filed one.

The Court has reviewed the Petition, Respondent's Answer and supplemental lodgments, Petitioner's Traverse and exhibits, and Guardado's Supplemental Brief. For the reasons discussed below, the Court recommends that Guardado's Petition be **DENIED**.

I. FACTUAL BACKGROUND

After the reversal of his 1989 conviction for being involved in a shooting death in 1979, Guardado was retried and convicted of second degree murder in 1995. (Lodgment No. 3, In re Guardado, M-12340XA, slip op. at 1 (Cal. Super. Ct. 2009).) Petitioner was sentenced to fifteen years to life. (Pet. 1-2, ECF No. 1.) According to Guardado, he was first eligible for parole on July 3, 2000. (Id. at 2.) He had his seventh parole hearing on September 25, 2008, which he attended with his attorney. (Lodgment No. 13, Exhibit A, In re Life Term Parole Consideration Hr'g of Paul Guardado, CDC No. E-36459, Hr'g Tr. 3 (Sept. 25, 2008) (exhibits to Orange County Superior Court habeas petition).) The hearing began with an introduction of the participants and an overview of the proceedings. (Id. at 3-17.) Members of the Parole Board discussed

case factors, pre-commitment factors, post-commitment factors, and Petitioner's parole plans. The board members asked Guardado questions, to which he responded, and the Petitioner made a closing statement. (See id. at 112-15.) His attorney spoke on Guardado's behalf several times during the hearing. (See id. at 9-10, 19-20.)

At the conclusion of the hearing, the Parole Board found that Petitioner was unsuitable for parole. (Id. at 116.) The Board indicated that the nature of the commitment offense weighed heavily on this decision. (See id. at 116-24.) The presiding commissioner described Guardado's crime as "particularly gruesome and cruel," and one that was "carried out dispassionately" and without any motive. (Id. at 117.) Additional reasons noted for denying Petitioner parole included his nonsevere criminal history, his minor institutional behavioral issues, his failure to include plans to attend Alcoholics Anonymous upon parole, and his need to develop more insight into the offense. (Id. 118-24.)

In ground one of his Petition, Guardado urges that the Parole Board's continued reliance on the thirty-year-old commitment offense is insufficient to show that he would pose an unreasonable risk of danger or be a threat to public safety if released from prison. (Pet. 7, ECF No. 1.) According to Guardado, the Board failed to show a "nexus" between the decades-old offense and the Petitioner's current status. (Id.) These failures, he claims, violated his Fourteenth Amendment due process protections. (Id.)

Next, in ground two, Petitioner argues that the Parole Board's comments that Guardado's criminal record "did not weigh heavily" in its decision and that it was concerned about a twelve-step program failed to show that Guardado posed an unreasonable risk if paroled.

(Id. at 9.) Petitioner asserts that these statements do not amount to "some evidence under the law that contained an indicia of reliability[,]" or "establish a rational nexus between those factors and the . . . determination of current dangerousness." (Id. (internal quotations omitted).) Guardado claims that without "some evidence" or a "rational nexus," the Parole Board's determination violated his due process rights. (Id.)

Finally, in ground three, Petitioner maintains that the continued denial of parole based on an offense he committed as a minor is also a violation of his due process rights. (Id. at 11.) He argues that the repeated denials effectively "turn Petitioner[']s parolable offense into a life [sentence] without the possibility of parole," in violation of California law. (Id.)

II. PROCEDURAL BACKGROUND

On February 2, 2009, Guardado filed a petition for writ of habeas corpus in the Orange County Superior Court contesting the Parole Board's September 25, 2008 decision to deny him parole. (Lodgment No. 7, Guardado v. Hoshino, [No. M-12340] (Cal. Super. Ct. [filed Feb. 2, 2009]) (petition for writ of habeas corpus at 2).) The superior court denied his collateral challenge on February 25, 2009. (Lodgment No. 3, In re Guardado, No. M-12340, slip op. at 1, 3.)

The Petitioner then filed a habeas petition in the California Court of Appeal, Fourth Appellate District. (Lodgment No. 8, Guardado v. Hoshino, [No. G041903] (Cal. Ct. App. [filed Apr. 14, 2009]) (petition for writ of habeas corpus).) The appellate court denied the petition as moot on July 16, 2009. (Lodgment No. 10, In re Guardado, No. G041903, slip op. at 1 (Cal. Ct. App. July 16,

2009).) Guardado filed his petition for review with the California Supreme Court on August 12, 2009. (Lodgment No. 12, Guardado v. Hoshino, No. S175180, (Cal. filed August 12, 2009) (petition for review).) The California Supreme Court summarily denied the petition on October 22, 2009. (See Lodgment No. 11, California Appellate Courts, Case Information, http://appellatecases.court info.ca.gov/ (visited Feb. 17, 2010)).)

On December 28, 2009, Guardado filed this federal Petition challenging the Board's September 25, 2008 finding of unsuitability for parole. (Pet. 1, ECF No. 1.)

III. STANDARD OF REVIEW

Guardado's Petition is subject to the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 because it was filed after April 24, 1996. 28 U.S.C.A. § 2244 (West 2006); Woodford v. Garceau, 538 U.S. 202, 204 (2003) (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). AEDPA sets forth the scope of review for federal habeas corpus claims:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States.

28 U.S.C.A. § 2254(a) (West 2006); see also Reed v. Farley, 512 U.S. 339, 347 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991).

To present a cognizable federal habeas corpus claim, a state prisoner must allege his conviction was obtained in violation of the Constitution or laws of the United States. 28 U.S.C.A § 2254(a). In other words, a petitioner must allege the state court

violated his federal constitutional rights. Hernandez, 930 F.2d at 719; Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990); Mannhald v. Reed, 847 F.2d 576, 579 (9th Cir. 1988). Petitions challenging a parole board's decision also fall under the umbrella of habeas review. See Swarthout v. Cooke, 562 U.S. __, __, 131 S. Ct. 859, 860 (2011) (per curiam).

A federal district court does "not sit as a 'super' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 786 F.2d 697, 700 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (holding that federal habeas courts must respect state court's application of state law); Jackson, 921 F.2d at 885 (concluding federal courts have no authority to review a state's application of its law). Federal courts may grant habeas relief only to correct errors of federal constitutional magnitude. Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to the level of a constitutional violation).

In 1996, Congress "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Amended section 2254(d) now reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of

> the evidence presented in the state court proceeding.

28 U.S.C.A § 2254(d).

The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003), stated that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under section 2254(d)(1) -- whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." Id. at 71 (citation omitted). A federal court is therefore not required to review the state court decision de novo, but may proceed directly to the reasonableness analysis under § 2254(d)(1). Id.

The "novelty" in § 2254(d)(1) is "the reference to 'Federal law, as determined by the Supreme Court of the United States.'" Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997) (emphasis in original deleted). Section 2254(d)(1) "explicitly identifies only the Supreme Court as the font of 'clearly established' rules." (Id.) "[A] state court decision may not be overturned on habeas corpus review, for example, because of a conflict with Ninth Circuit-based law." Moore, 108 F.3d at 264. "[A] writ may issue only when the state court decision is 'contrary to, or involved an unreasonable application of,' an authoritative decision of the Supreme Court." Id. (citing Childress v. Johnson, 103 F.3d 1221, 1224-26 (5th Cir. 1997); Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996); see Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)).

Furthermore, with respect to the factual findings of the trial court, AEDPA provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C.A. § 2254(e)(1).

IV. DISCUSSION

Petitioner alleges that his right to due process under the Fourteenth Amendment was violated because the Parole Board did not have "some evidence" to deny him parole, and the Board's reliance on the offense Guardado committed as a minor effectively alters his sentence into a life sentence without parole. (Pet. 7, 9, 11, ECF No. 1.)

A. Due Process in the Parole Context

At the time Guardado filed his Petition, Ninth Circuit law allowed federal courts to grant habeas relief when they concluded that the state courts had misapplied California's "some evidence" standard. See Hayward v. Marshall, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc). When reviewing a due process challenge to the denial of parole in California, district courts were to determine "whether the California judicial decision approving [a parole board's] decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.'" Id. (footnotes omitted). The Ninth Circuit explained, "By holding that a federal habeas court may review the reasonableness of the state court's application of the California 'some evidence' rule, Hayward necessarily held that compliance with the state requirement is mandated by federal law, specifically the

Due Process Clause." Pearson v. Muntz, 606 F.3d 606, 609 (9th Cir. 2010). Relying on these cases, Guardado asks this Court to find that his due process rights were violated because the state courts misapplied California's "some evidence" standard. (See Pet. 7, 9, ECF No. 1.)

On January 21, 2011, after the merits of Guardado's Petition were briefed, the Supreme Court decided Swarthout v. Cooke, and rejected the Ninth Circuit's framework for analyzing due process challenges to parole denials. Swarthout v. Cooke, 562 U.S. at __, 131 S. Ct. at 861-63; see Roberts v. Hartley, 640 F.3d 1042, 1045 (9th Cir. 2011) (acknowledging the Supreme Court's recent rejection of Ninth Circuit due process analysis in the parole context). In Swarthout, the Court reaffirmed that federal habeas relief is unavailable for errors of state law and that due process does not require the correct application of California's "some evidence" standard. Swarthout, 562 U.S. at __, 131 S. Ct. at 861. Instead, whether petitioners received adequate procedural protections under the standard described by the Supreme Court in Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979), is "the beginning and the end" of the due process analysis in the parole context. Id. at 862.

In Greenholtz, the Court determined that if the parole procedure affords the inmate an opportunity to be heard and informs the inmate of the reasons for denial, the procedure meets constitutional requirements. Greenholtz, 442 U.S. at 16.

I. Application to Guardado's Claims

In response to Swarthout, Petitioner filed a supplemental brief addressing the effect of the ruling on this Petition. (See

Pet'r's Supplemental Br. 1, ECF No. 27.) Although Guardado acknowledges that the Supreme Court recently "determined that the review by federal courts to determine whether a due process violation had occurred [from a parole denial] was limited to" whether there were adequate procedural protections, he nevertheless maintains that the ruling does not preclude his claims. (Id. at 1-2.)

To support the proposition that Swarthout does not apply here, Guardado first asserts that California state courts have held that the judicial review limited to procedural safeguards described in Greenholtz does not satisfy due process. (Id.) Petitioner argues that a California appellate court has held that the Greenholtz standard is inadequate because it affords nothing more than "pro forma consideration." (Id. (quoting In re Morrall, 102 Cal. App. 4th 280, 296, 125 Cal. Rptr. 2d 391, 405 (2002)).) Guardado reasons that because the California Supreme Court has not issued an opinion on the adequacy of a Greenholtz standard, In re Morrall should be controlling. (Id. at 3-4 (citing Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th Cir. 2007).)

While it is true that Ryman states that federal courts must follow a state intermediate appellate court decision in the absence of a controlling state high court opinion, that rule only applies when a federal court is required to apply state law. Ryman, 505 F.3d at 994. Here, the Court is not asked to apply state law. Petitioner is seeking habeas relief from a federal constitutional violation. Lower federal courts are bound to adhere to the controlling decisions of the United States Supreme Court. Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[A] precedent of [the Supreme]

Court must be followed by the lower federal courts[.]"). Thus, In re Morrall does not apply.

Petitioner also argues that Swarthout is inapplicable because Greenholtz protections are inadequate for California's parole laws. (See Pet'r's Supplemental Br. 5-6, ECF No. 27.) According to Guardado, the Court in Greenholtz was "denied the benefit of the Nebraska courts' interpretation of [Nebraska's] parole laws," whereas the Court in Swarthout had the benefit of California courts' interpretations of the "application/standards of California's parole laws." (Id. at 6 (internal quotations omitted).) Petitioner contends, "California courts have 'equat[ed] California's parole system with good time credits' sufficient enough to 'convert [] California's "some evidence" rule into a substantive federal requirement' to apply the 'some evidence' standard announced in Hill to protect Petitioner's right to due process of law." (Id. at 10 (alterations in original)(footnote omitted).)

The Supreme Court squarely rejected the argument that the greater protections afforded to the revocation of good-time credits should apply to denials of parole and stated, "The question of which due process requirements apply is one of federal law, not California law . . . ." Swarthout, 562 U.S. at __, 131 S. Ct. at 862 n.*. This also disposes of Guardado's argument that this Court must "ensure the California standards for parole have been met when reviewing the interest in receiving parole." (Pet'r's Supplemental Br. 10, ECF No. 27.) Again, due process requirements are determined by federal law, not state law. Swarthout, 562 U.S. at __, 131 S. Ct. at 862 n.*.

Lastly, Petitioner argues that his claim that continued denial of parole based on an offense he committed as a minor effectively gives him a sentence of life without parole should not be reviewed under Greenholtz or Swarthout. (Pet'r's Supplemental Br. 12, ECF No. 27.) Guardado seeks independent review of that claim because the state courts failed to address the claim fully or provide reasoned analysis. (Id. at 13 (citing Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).) He maintains that the procedures to protect his substantial right not to be subjected to life imprisonment are not constitutionally sufficient because the Parole Board and the State are only empowered to hold suitability determinations. (Id. at 14.)

These arguments are without merit. First, Guardado remains eligible for parole, so he cannot be subject to life imprisonment without possibility of parole. (See Lodgment No. 13, Exhibit A, In re Life Term Parole Consideration Hr'g of Paul Guardado, CDC No. E-36459, Hr'g Tr. 124 (denying parole for only one year.) Second, Petitioner does not adequately explain how the state's alleged violation of its laws rises to a constitutional violation. See Jackson, 921 F.2d at 885 (concluding federal courts have no authority to review a state's application of its law). Next, although Guardado asserts that the state courts did not provide a reasoned analysis of his claim, the superior court order denying habeas corpus relief refutes Petitioner's assertion. (See Lodgment No. 3, In re Guardado, M-12340XA, slip op. at 1-3.) Consequently, deferential review of the state court decisions is appropriate. See Pirtle, 313 F.3d at 1167.

Finally, Petitioner has failed to show that Swarthout does not apply to his Petition. Case law makes clear that the ruling applies to habeas petitions challenging a denial of parole, so this Court will follow the analysis outlined in Swarthout. See Pearson, 639 F.3d at 1191; Miller v. Oregon Bd. of Parole & Post-Prison Supervision, 642 F.3d 711, 716-17 (9th Cir. 2011); Styre v. Adams, 645 F.3d 1106, 1108 (9th Cir. 2011); Gomez v. Small, No. 09-cv-1972W(JMA) 2011 U.S. Dist. LEXIS 90093, at *6-7 (S.D. Cal. Aug 12, 2011); Osborne v. Uribe, No. 11 cv 786-MMA(BLM) 2011 U.S. Dist. LEXIS 122834, at *7 (S.D. Cal. Aug 29, 2011); Jenson v. Cate, No. 10-cv-0992-H(WMC) 2011 U.S. Dist. LEXIS 118097, at *8-9 (S.D. Cal. Oct 11, 2011).

ii. Analysis

California's parole statute provides that the Board of Prison Terms "shall set a release date unless it determines that . . . consideration of the public safety requires a more lengthy period of incarceration . . . ." Cal. Penal Code § 3041(b) (West Supp. 2010). If the Board denies parole, the prisoner can seek judicial review in a state habeas petition. Swarthout, 562 U.S. at ___, 131 S. Ct. at 860. The California Supreme Court has explained that "the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." In re Lawrence, 44 Cal. 4th 1181, 1191, 82 Cal. Rptr. 3d 169, 173, 190 P.3d 535, 539 (2008).

The Due Process Clause requires fair procedures for the deprivation of a liberty interest, and federal courts will review the application of those procedures. Swarthout, 562 U.S. at ___,

131 S. Ct. at 862. Where, as here, a prisoner challenges a denial of parole on due process grounds, the "standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." Id. at 861.

The first step of the due process analysis is satisfied. The Ninth Circuit has concluded, and the Supreme Court has accepted, that California law creates a liberty interest in parole that is protected by the Fourteenth Amendment Due Process Clause. See id. at 861–62.

Second, in the context of parole, the constitutionally-required procedures are minimal. Id. Due process is satisfied as long as the state provides an inmate seeking parole with "an opportunity to be heard and . . . a statement of the reasons why parole was denied." (Id. at 862 (citing Greenholtz, 442 U.S. at 12).

Here, Guardado had an opportunity to be heard, and he received an explanation from the Board for its denial. At the September 25, 2008 hearing, Guardado answered questions from the Parole Board before giving a closing statement. He discussed his criminal history, family, prior employment, drinking habits, education, and institutional write-ups, among others. (See Lodgment No. 13, Exhibit A, In re Life Term Parole Consideration Hr'g of Paul Guardado, CDC No. E-36459, Hr'g Tr. 24-47). Guardado was also given the opportunity to make the final statements before the Board convened for deliberations. (Id. at 112-15.) The Board concluded the hearing by discussing the reasons for its denial, which

included the gravity of the commitment offense, "some concerns" about the psychological evaluations, lack of remorse and insight, and concerns about Petitioner's parole plans. (Id. at 116-24.)

Guardado does not allege that the procedures used by the state in determining his parole eligibility were constitutionally deficient. Instead, he argues that the failure to correctly follow state laws constituted a violation of his federal due process rights. (See Pet. 7, 9, 11, ECF No. 1.) Federal habeas relief is not available to retry a state issue that does not rise to the level of a federal constitutional violation. Swarthout, 562 U.S. at ___, 131 S. Ct. at 861 ("We have stated many times that 'federal habeas relief does not lie for errors of state law.'"); Wilson v. Corcoran, 562 U.S. ___, ___, 131 S. Ct. 13, 16 (2010); Estelle v. McGuire, 502 U.S. 62, 67–68 (1991); Souch v. Schiavo, 289 F.3d 616, 623 (9th Cir. 2002).

Accordingly, the state court's denial of Petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254; Williams v. Taylor, 529 U.S. 362, 403 (2000). Guardado's claims should be **DENIED**.

B. Motion for Reconsideration

Petitioner states that if the Court determines that further due process analysis is warranted, he asks the Court to reconsider Petitioner's Motion for Appointment of Counsel [ECF No. 11] and Application for In Forma Pauperis Status [ECF No. 20]. (Pet'r's Supplemental Br. 12 n.9.) In an application for reconsideration, a party seeking the same relief as that previously denied must set forth "(1) when and to what judge the [prior] application was made,

(2) what ruling or decision or order was made thereon, and (3) what new or different facts and circumstances are claimed to exist which did not exist, or were not shown, upon such prior application." S.D. Cal. Civ. R. 7.1(i)(1). Further, any motion for reconsideration must be filed within twenty-eight days after the prior order was entered. Id. at 7.1(i)(2).

Here, Guardado does not comply with the requirements of Civil Local Rule 7.1(i), and any request for reconsideration is **DENIED** on that basis.

V. CONCLUSION

"Because the only federal right at issue is procedural, the relevant inquiry is what process [Guardado] received, not whether the state court decided the case correctly." Swarthout, 562 U.S. at __, 131 S. Ct. at 863. Because Petitioner cannot show that he was deprived of the minimal procedural protections described in Greenholtz at his September 25, 2008 parole hearing, the Court recommends that the Petition be **DENIED**.

This Report and Recommendation will be submitted to the United States District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties on or before December 2, 2011. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before December 16, 2011.

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The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

Dated: November 4, 2011

RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Whelan
All parties of record